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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

Nos. 76-1266 and 76-1304

NATIONAL ASSOCIATION OF REGIONAL MEDICAL PROGRAMS, INC., *et al.*,

Petitioners,

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE, *et al.*,

JEROME S. WAGSHAL,

Petitioner,

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE, *et al.*,

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER JEROME S. WAGSHAL

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The important issue presented by these two petitions is whether this Court will permit a major exception to be created in the "common benefit" or "common fund" principle of judicial attorneys' fee awards, after

that principle has been consistently followed in the Federal courts for almost a century. The exception which the two court of appeals decisions have created is to deny the application of that principle in cases involving the recovery of Federal grant funds, in these cases HEW grant funds, for the benefit of plaintiff classes of private persons, the grant recipients. In the light of the fact that most HEW appropriations bills have been vetoed in the recent past, and in the light of reports that the current HEW appropriation bill is opposed by the present Administration, this issue is clearly one of continuing concern, involving a problem likely to recur.[1]

I.

FEE AWARDS FROM GRANT FUNDS

The Federal respondents' opposition attempts to turn the Court's focus away from the key issue presented by these two cases, by confusing the "common benefit" fee award with the award which was the subject of this Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240. The distinction between these two types of judicial fee awards is critical:

> – The fee award dealt with in *Alyeska* was one to be paid by a losing defendant to a prevailing plaintiff. *Alyeska* limited the instances when such an award could be made.
>
> – The fee award presented by these two cases involves payment by a prevailing plaintiff (and

[1] See The Washington Post, Monday, May 23, 1977, p. 1, col. 3, "SHAKEDOWN CRUISE FOR CARTER-HILL. A POSSIBLE MONEY BILL VETO," Walter Pincus.

> plaintiff class members) to the attorney who successfully represented them.

There is a world of practical difference between these two situations. In the former, the benefiting plaintiff *receives* the money from his defeated adversary. In the latter case the benefiting plaintiff *pays* the money to the attorney who obtained the benefit for him. In *Alyeska* this Court was careful to make clear that it was not limiting, indeed, was endorsing the second type of fee award. 421 U.S. at 258.

The two cases now before the Court are classic fact situations for the application of the "common benefit" type of fee award, since they involve recovery of hundreds of millions of dollars for private parties by an attorney who represented the plaintiff classes. Yet the court of appeals in the two decisions has apparently blocked every avenue by which the district court could make a "common benefit" award.

The Federal respondents' opposition is based on the assumption that the "common benefit" award made to petitioner by the district court in these two cases came from money belonging to the Federal government. Building on this premise, the Federal respondents say that the awards are barred by the decision in *Alyeska*. Building further on the same premise, they say that the awards are barred by 28 U.S.C. 2412, and that this statute "contains no exception for the 'common fund' or 'common benefit' doctrine." Opp. 7. Finally, they phrase the "Question Presented" in terms of the same argument – that the grants are made under the Public Health Service Act and the Community Mental Health Centers Act, and that there is an "absence of any applicable provision in either statute authorizing such an award." Opp. 2.

These arguments would be germane if the money awarded petitioner could be considered money of the United States. In that case, 28 U.S.C. 2412 would bar a payment from the United States as a defeated litigant, in the absence of a statute specifically authorizing the award. In other words, the necessity of finding a specific statutory authorization for the fee award arises only after it is concluded that the money to be paid petitioner belongs to the United States, not the grantees. If the money belongs to the grantees, then the burden goes the other way, *i.e.*, the award may be made in the absence of a statutory command barring it. *Compare Porter v. Warner Co.*, 328 U.S. 395, 398, quoted *infra,* p. 8

And if the money used for the awards belongs to the benefiting class members, the grant recipients, neither 28 U.S.C. 2412 nor the *Alyeska* decision apply. When the judicial fee award comes from the benefiting parties under the "common benefit" principle, it is made by virtue of the inherent equitable powers of the court, as defined in *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939). The issue presented by these two petitions is how can petitioner receive an equitable fee award from the benefting class members? The court of appeals' answer was

> Although we recognize that Wagshal has rendered a significant service . . . we cannot award him a reasonable fee.

No. 76-1304, 36a. In view of the fact that this result violates the "common benefit" rule, which hitherto had "been consistently followed" (*Alyeska, supra*, 421 U.S. at 257-8), and diminishes the equity jurisdiction of the Federal courts, petitioner urges that this Court provide a better answer.

The basic error made by the court of appeals, which the Federal respondents seek to perpetuate, is that the grant receipients could not be directed to pay petitioner their *pro rata* shares of his award out of the grant money awarded them, the grantees' available source of funds, on the ground that this money actually belonged to the United States. For many reasons this conclusion is incorrect:

1. In each case the decision on the merits ordered the money paid out to the plaintiff classes, and the fee awards came from this money. This is not a case, as the Federal respondents would have it, in which additional monies beyond those appropriated by Congress for grants are to be taxed against the Government on account of litigation costs. How can money intended under court order to be transferred to private parties still be deemed to belong to the government? (Whatever the force of defendants' regulations, restricting the grantees' use of the money see *infra,* p. 8, such regulations do not change its ownership.)

2. The court's reservation of some of the money ordered paid to the grantees, for purposes of a fee award does not change the ownership of the money. It has been repeatedly held in similar cases that the fact that the district court may reserve or divert some of the money which it has ordered paid out from the Treasury to private grantees, for use in a "common benefit" award, does not change the ownership of the money. See, *e.g.*, *Houston v. Ormes*, 252 U.S. 469; *Lafferty v. Humphrey*, 101 U.S. App. D.C. 222, 248 F.2d 82, cert. denied, sub nom., *Benton County v. Lafferty*, 355 U.S. 869. In other words, these decisions establish that the fact that the money reserved for fee payment was in the U.S. Treasury, and had not yet been paid out, did not make the government the owner of the money,

when it was legally supposed to be paid out to private recipients. The decisions denying petitioner an award reach a contrary result.

3. Since the money belongs to the grantees, not the government, the fact that statutes may specify how the grantees shall use the money or otherwise restrict the use of the money, does not strip the federal courts of their traditional equitable powers to award a fee from such funds to an attorney recovering the money. *Compare, United States v. Equitable Trust Co.*, 283 U.S. 738, 744. See also *Porter v. Warner Co.*, quoted *infra*, p. 8.

4. The requirement that the money must be paid out to the grantees is embedded in three statutes heretofore cited and discussed by petitioner: No. 76-1266, at 4-5, 27-28; No. 76-1304, at 4-5, 20-22. The Federal respondents argue that these statutes "do not require or permit such funds to be made available for payment of attorney's fees." Opp. 6. But this misses the point. What these statutes do, is require that all the impounded funds be paid out, thus changing the ownership of the money. That is how these cases were won on the merits. The Federal respondents step around this point, by saying that these three laws "relate to the Secretary's duty to carry out Congressionally authorized mental health[2] programs without impounding appropriated funds." Opp. 6. This euphemism cannot disguise the fact that these laws required the full release of the money to the designated grantees. By

[2]The statutes are of course far broader than this. Sec. 601 of the Medical Facilities Construction and Modernization Amendments of 1970 as amended, 42 U.S.C.A. §§201 note and 2661 note, applies to the entire Public Health Service Act. The other two statutes are laws of general application.

mandating the release of this money, these statutes bring these cases within the same rule as *Houston v. Ormes, supra, Lafferty v. Humphrey, supra*, and the other cases cited at 76-1266, p. 25; 76-1304, pp. 17-18.[3]

5. The question of what happens to grant funds at the end of a budget period, whether they "lapse" into the Treasury, was a factual issue on which the Court of Appeals reversed the district court in the face of unrefuted evidence that the district court was correct, that the funds do not so lapse. See the quotation at 76-1304 at 23-24. The Federal respondents continue to maintain by *ipse dixit* that these funds do "lapse" as the court of appeals concluded, without any attempt to face the existence of the conclusive evidence against this conclusion. Opp. 6. Moreover, this factual question is subsidiary to the legal mandate of the three statutes

[3]The denial of certiorari in No. 76-1265 does not alter this conclusion. No. 76-1266 made final the decision that the government had the right to hold back a portion of the appropriated funds to pay the expense of "direct operations," i.e., administering the grant programs, and to permit the money so reserved to lapse into the Treasury if not used. However, the money used by the district court for petitioner's fee awards was not taken from such reserved "direct operations" money, but rather from the released grant funds. See 76-1304, 18a ("The record discloses that a portion of the money released by the litigation remains unused.") In 76-1266, the fee award has already been paid petitioner by the class members. They paid in part from grant funds and in part from other money belonging to the grantees which did not come from the government. 76-1266, at 15-16, 40A-41A, 42A-43A. In a separate step in its order, the district court directed reimbursement to the class members from a reserve fund which the defendants chose to establish out of "direct operations" funds. *Id.* Whatever effect the denial of 76-1265 may have on this reimbursement part of the order, it does not govern the first part of the order which authorizes payment to petitioner from grant funds.

relied on by petitioner, that these grant appropriations must be paid out, a conclusion the Federal respondents nowhere directly deny.

6. In the final analysis the Federal respondents' case throughout this litigation has been based on their regulations barring payment of attorney's fee payments by HEW grantees in connection with claims against the government. Respondents' position is that "A claim for release of impounded funds is self-evidently a claim against the government." Opp. 7, n. 7. The federal government unsuccessfully maintained the same position in *Houston v. Ormes, supra*, 252 U.S. at 472-4.

* * *

The Federal respondents are in plain effect seeking to preserve the force of their own regulations as superior to the inherent equitable powers of the Federal courts. This Court has stated that

> [T]he comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.

Porter v. Warner Co., 328 U.S. 395, 398; *Mitchell v. DeMario Jewelery*, 361 U.S. 288, 291. Unless the court of appeals decisions are reversed by this Court, these basic principles of equity will be undercut in an area of great significance. This Court has never considered the application of Section 2412 to the "common fund" or "common benefit" doctrines. The lower court's application of that statute in this case, where the effect is to undermine the purposes of the substantive legislation

under which the actions were originally brought, is an important issue, worthy of consideration by this Court.

II.

FEE AWARDS FROM CLASS MEMBERS

Equally worthy of consideration by this Court is the lower court's revision of the principles laid down by this Court in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306. The concept that litigants must be adequately represented cannot be disputed in general, but this concept does not force civil litigants to retain counsel against their will. The court of appeals decisions in these two cases permit plaintiff class members to avoid an equitable payment by the device of refusing to retain counsel for the fee application proceeding. Indeed, since retention of counsel is likely to involve expense, and the class members can avoid payment by *not* retaining counsel under the court of appeals rule, why should they do so?

Thus, the important issue in this aspect of the petitions is whether adequate notice to the class members of a fee application[4] is enough to enable the court to render a judgment requiring them to pay a fee to the attorney who conferred the benefit on them. In *Mullane, supra*, this Court indicated notice was enough. It gave no suggestion that the class members could get out of the proceeding by refusing to appear in response to proper notice. The court of appeals

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[4]There is no challenge to the adequacy of notice of the fee application in either case, and in 76-1266, no challenge to the adequacy of notice of the litigation on the merits, as well. See 76-1266 at 29A, 53A.

decisions in these cases permit petitioner to be euchred out of his fee award by just such a device.

Petitioner re-emphasizes that the record in 76-1266 establishes that all class members had been canvassed before the district court's hearing on the fee application, and had unanimously agreed to pay a fee such as might be awarded by the court. *Further, all class members have already paid petitioner his fee.* The Federal respondents suggest that petitioner now bring a separate proceeding for this fee already paid him. Review by this Court of the basic principle involved would be a better course than such a formalism.

III.

PENDENCY OF A RELATED CASE

Petitioner again invites the Court's attention to the pendency of a third, and related fee application proceeding in the court of appeals, *National Association for Mental Health v. Califano*, Nos. 75-2212 and 75-2245 (D.C. Cir.). Briefing has been completed in that appeal, and the Federal appellants have moved for summary disposition without oral argument.

The *National Association for Mental Health* appeal raises many of the same issues presented by the instant petitions. See opinion of the district court at 68 F.R.D. 387.

However, among several significant differences in that case are:

(i) The fee award was made largely from actual deductions from grants made to class members; and

(ii) At the fee hearing, class members appeared by separate counsel and actively opposed the award.

Thus, this Court may wish to defer consideration of the instant two petitions, to see if the court of appeals decision in this third case adds a piece to the mosaic of law created by these two decisions of the court of appeals, which should be considered as a whole by this Court.

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